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ALEXANDER L. STEVAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY K. SMITH,

Petitioner,

vs.

GEORGE P. RUSSELL,

Respondent,

No. 84-924

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent George P. Russell, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Florida Supreme Court opinion in this case. That opinion is reported at 456 So.2d 462 (Fla. 1984).

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CASES

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Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).	7, 15 16
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Torres v. Playboy Enterprises, Inc., 235 So.2d 759 (Fla. 3d D.Ca. 1970, cert. denied, 240 So.2d 813 (Fla. 1970). 8

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OTHER AUTHORITY

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BOOKS AND TREATISES

R. L. Stern & E. Gressman, Supreme Court Practices (5th ed. 1976).	15
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QUESTION PRESENTED

Whether this Court should grant this writ of certiorari to determine how far down among the ranks of government employees the public official designation extends for purposes of the New York Times Co. v. Sullivan rule and to otherwise specify the categories of persons who would or would not be included.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a question relevant to United States Constitutional Amendment I; United States Constitutional Amendment XIV; 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

On September 13, 1984, the Florida Supreme Court issued its opinion in the case sub

judice. Respondent believes that the statement of facts as set out in Petitioner's brief is inaccurate and prejudicial in that certain facts are exaggerated. Because the opinion concisely sets forth the facts, portions of that opinion are repeated below:

"Respondent Russell, the defendant, was arrested for driving while intoxicated (DWI) by petitioner/plaintiff Smith, a City of St. Petersburg police officer. At the time of his arrest and later to the judge when he pleaded nolo contender to the DWI charge, the defendant complained about the arrest procedure and the plaintiff's use of unnecessary force. Both the judge and plaintiff suggested to the defendant that he register a complaint with the chief of police.

"The defendant wrote three letters detailing his complaints about the plaintiff, one or more of which were sent to the police chief, the traffic court judge, the plaintiff,

defendant's attorney, and Judge Shingler a friend of the defendant. The plaintiff subsequently was passed over for promotion and sued the defendant for defamation.

"At trial the defendant requested jury instructions that the plaintiff, as a police officer, was a public official as a matter of law, and that criticism of a public official relating to his official conduct was actionable only upon a showing of actual malice under New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The trial court refused, but did instruct the jury to consider the applicability of a privilege under the common interest or duty regarding the subject matter to comment to another with a corresponding interest or duty. See, e.g., Lewis v. Evans, 406 So. 2 489 (Fla. 2d DCA 1981): Axelrod v. Califano, 357 So. 2d 1028 (Fla. 1st DCA 1978). The jury found for the plaintiff, awarding compensatory and punitive damages.

"The defendant appealed, claiming the

trial court erred in refusing to instruct the jury on the qualified privilege to criticize a public official who in order to recover for defamation must establish that a defamatory communication about him was made with actual malice or reckless disregard for the truth."

"The plaintiff argues that refusal to instruct on the public official privilege was harmless error in that a finding of malice was implicit in the jury's punitive damage award; thus, even had the public official instruction been given, the jury's finding of malice would have defeated the privilege. The district court disagreed, finding that "[t]he 'common interest' instruction left the jury free to consider the case as if no qualified privilege existed, whereas the 'public official' instruction would have bound the jury to give consideration to a qualified privilege." Smith, 434 So. 2d at 344. We approve the district court's decision. A police officer qualifies as a public official as

defined in Rosenblatt v. Baer, 383 U.S. 75, 85-86, (1966)."

On September 13, 1984, the Florida Supreme Court approved the decision of the Second District Court of Appeal and the decision of the appellate court which reversed and remanded the case for new trial. Russell v. Smith, 434 So. 2d 342.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below is in harmony with the decisions of the court, the Supreme Court of Florida and courts of other states as to whether a police officer is a public official.

New York Times v. Sullivan and its progeny have held in an unbroken line of decisions that police officers are "public officials".[1] Petitioner offers in response to this unanimous and overwhelming body of precedent only the erroneous argument that the rationale of New York Times v. Sullivan does not support these holdings. In fact, as shown below, all courts which have considered the issue have held all police officers, of whatever rank or title, to be

1. While most of these decisions appear to involve only the press, it has been clear since New York Times v. Sullivan, 376 U.S. 254 (1964), that the citizen is equally protected. As the Supreme Court noted in Sullivan, "we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press." Id. at 265.

"public officials" because police play a unique and critical role in the maintenance of this society. Police directly wield extraordinary and virtually unsupervised governmental power over the public at large. For this reason public debate about the conduct of police must be "wide-open and robust". Only application of the actual malice rule can secure such freedom of expression.

Courts Have Universally Found Law Enforcement Libel Plaintiffs To Be "Public Officials"

Long before the United States Supreme Court constitutionalized the law of defamation the Florida Supreme Court determined that police officers are "public officials" under the Florida common law of libel. White v. Fletcher, 90 So.2d 129 (Fla. 1956); see also Wardlow v. City of Miami, 372 So.2d 976, 979 n4 (Fla. 3d D. C. A. 1979). Florida courts created a qualified privilege allowing members of the public to

freely comment on the actions of public officials. The Florida Supreme Court has held:

> "...any one who seeks public employment or public office or who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that they may determine whether it squares with such a standard of integrity and correct morals as warrants their approval."

Kennett v. Barber, 159 Fla. 81,83, 31 So.2d 44,46 (1947).

This early case became the cornerstone for the Florida Supreme Court decision that held a uniformed policeman is a public official: White v. Fletcher, supra. Here, the plaintiff was a police officer for the City of Orlando, who received much public attention because he was a witness in the prosecution of a prostitute in whose activities he was allegedly involved. The court based its decision on the following rationale:

> "The uniformed policeman, therefore, was certainly subject to fair comment and criticism from any member of the public of

> the City of Orlando. The generally accepted rule is that "public officials" or "public men" are subject to such fair comment. Cason v. Baskin, 159 Fla. 31, 30 So.2d 635. This court has said a person whose duty it is to perform agency for the State is a "public officer," and that a person in the service of the government who derives his position from duly authorized election or appointment is a public officer. State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721. There could be little doubt that a policeman, then, is a "public officer."
>
> White v. Fletcher, 90 So. 2d 129 at 131 (Fla. 1956).

Thus, in large measure Florida anticipated the development of the federal constitutional protection that has been afforded speech about public officials in the 20 years since New York Times v. Sullivan.

In New York Times v. Sullivan, the United States Supreme Court constitutionalized libel law by holding a "public official" may not recover damages for a "defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'

- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80. In explicating the New York Times v. Sullivan standard, the Supreme Court has held the public official must show with "clear and convincing proof," Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), "that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

Although not every person on government payroll is a public official, Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979), "every court that has faced the issue has decided that an officer of law enforcement, from ordinary patrolman to Chief of Police, is a 'public official' within the meaning of federal constitutional law." Roche v. Egan, 433 A.2d 757, 762 (Me. 1981); see generally, Libel and Slander: Who Is A Public Official Or Otherwise

Within The Federal Constitutional Rule Requiring Public Officials To Show Actual Malice, 19 A.L.R. 3d 1361 Section 5(d) (1968) and Supp.1983).

Law enforcement personnel of every rank and description have been held to be 'public officials' for libel purposes, including wardens or prisons,[2] chiefs of police,[3] sheriffs,[4] deputy

2. West v. New York Daily News, 5 Med. L. Rptr. 1269 (N.Y. Sup. Ct. 1979) (warden at the Brooklyn House of Detention conceded he was a public official).

3. Jurkowski v. Crawley, 637 P.2d 56 (Okla. 1981); Brophy v. Philadelphia Newspapers, Inc., 281 Pa. Super. 588, 422 A.2d 625 (1980); Goolsby v. Wilson, 146 Ga. App. 288, 246 S.E.2d 371 (1978); Henry v. Collins, 380 U.S. 356 (1965); Ashton v. Commonwealth, 405 S.W.2d 562 (Ky. 1965), rev'd. on other grounds, 384 U.S. 195 (1966); Kidder v. Anderson, 354 So.2d 1306 (La. 1978), cert. denied, 439 U.S. 829 (1978).

4. Foster v. Upchurch, 624 S.W.2d 564 (Tex. 1981); Hoag v. Clegg, 5 Med.L. Rptr. 1732 (Mich. Cir. Ct. 1979) (both sides stipulated that plaintiff was a public official).

sheriffs,[5] deputy chiefs of detectives,[6] police captains,[7] sergeants,[8] detectives,[9] federal drug

5. Romero v. Abbeville Broadcasting Service, 420 So.2d 1247 (La. App. 1982); Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 572 P.2d 1258 (Ct. App. 1977) cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977), cert. denied, 436 U.S. 906 (1978); Hirman v. Rogers, 257 N.W.2d 563 (Minn. 1977); Cline v. Brown, 24 N.C. App. 209, 201 S.E.2d 446 (1974), cert. denied, 286 N.C. 412, 211 S.E.2d 793 (1975); St. Amant v. Thompson, 390 U.S. 727 (1968).

6. Time Inc. v. Pape, 401 U.S. 279 (1971).

7. McCarney v. Des Moines Register & Tribune Co., 239 N.W.2d 152 (Iowa 1976) (court implicitly found plaintiff to be a public official; Thuma v. Hearst Corp., 340 F.Supp. 867 (Md. 1972); Mahnke v. Northwest Publications, Inc., 280 Minn. 328, 160 N.W.2d 1 (1968).

8. Seymour v. A.S. Abell Company, 557 F.Supp. 951 (Md. 1983); Rosales v. City of Eloy, 122 Ariz. 134, 593 P.2d 688 (Ct. App. 1979); Ramacciotti v. Zinn, 550 S.W.2d 217 (Mo.Ct. App. 1977); Corbett v. Register Publishing Co., 33 Conn.Supp. 4.

9. Roche v. Egan, 433 A.2d 757 (Me. 1981); Colombo v. Times-Argus Assn., 135 Vt. 454, 380 A.2d 80 (1977).

agents,[10] federal customs inspectors,[11] state highway patrolmen,[12] and city investigators.[13]

10. Hansen v. Stoll, 130 Ariz. 454, 636 P.2d 1236 (Ct.App. 1981); Hart v. Playboy Enterprises, Inc., 5 Med.L. Rptr.1811 (D.Kan. 1979); Meiners v. Moriarty, 563 F.2d 343 (7th Cir. 1977).

11. Torres v. Playboy Enterprises, Inc., 7 Med. L.Rptr. 1182 (S.D.Tex. 1980).

12. Roberts v. Dover, 525 F.Supp. 987 (M.D.Tenn. 1981); NAACP v. Moody, 350 So.2d 1365 (Miss. 1977).

13. Bishop v. Wometco Enterprises, Inc., So.2d 759 (Fla. 3d DCA 1970), cert. denied, 240 So.2d 813 (Fla. 1970).

More important still, the state and federal courts have uniformly found that police patrolmen are public officials.[14]

14. Harrison v. Williams, 430 So.2d 585 (Fla. 4th DCA 1983); Hines v. Florida Publishing Co., 7 Med.L. Rtr. 2605 (Fla. 4th Jud. Cir. Ct. 1982); Willis v. Perry, 10 Med. L. Rptr. 1217 (Colo.App. 1983); Seymour v. A. S. Abell Company, 557 F.Supp. 951 (D. Md. 1983); Gomes v. Fried, 136 Cal. App.3d 924, 186 Cal. Rptr. 605 (1st Dist. 1982); Dunlap v. Philadelphia Newspapers, Inc., 301 Pa. Super. 475, 448 A.2d 6 (1982); Gray v. Udevitz, 656 F.2d 588 (10th Cir. 1981); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761 (N.J. 1981); Shafer v. Lamar Publishing Co., 621 S.W.2d 709 (Mo. App. 1981); McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980); Angelo v. Brenner, 84 Ill. App.3d 594, 40 Ill.Dec 337, 406 N.E.2d 38 (1980); La Rocca v. New York News, Inc., 156 N.J. Super. 59, 383 A.2d 451 (App. Div. 1978); Malerba v. Newsday, Inc., 64 App. Div.2d 623, 406 N.Y.S.2d 532 (2d Dept. 1978); Orr v. Lynch, 60 App. Div.2d 949, 401 N.Y.S.2d 897 (3d Dept. 1978), aff'd., 45 N.Y.2d 903, 411 N.Y.S.2d 10, 383, N.E.2d 562 (1978); Della v. Berkey, 41 Md.App. 47, 395 A.2d 1189 (1978), aff'd., 287 Md. 302, 413 A.2d 170 (1980); Akins v. Altus Newspapers, Inc., 609 P.2d 1263 (Okla. 1977), cert. denied, 449 U.S. 1010 (1980); Dellinger v. Belk, 34 N.C.App. 288, 238, S.E.2d 788 (1977), cert. denied, 294 N.C. 182, 241 S.E.2d 517 (1978); Weber v. Woods, 31 Ill. App.3d 122, 334 N.E.2d 857 (1975); Rawlins v. Hutchison Publishing Co., 218 Kan. 295, 543 P.2d 988 (1975); Moriarty v. Lippe, 162 Conn. 371, 294 A.2d 326 (1972); Rowden v. Amick, 446 S.W.2d 849 (Mo. App. 1969); Coursey v. Greater Niles Township Publishing Corp., 40 Ill.2d 257, 239 N.E.2d 837 (1968); Scelfo v. Rutgers University, 116 N.J. Super. 403, 282 A.2d 445 (1971).

These courts hold that patrolmen "perform governmental duties directly related to the public interest and have or appear to have substantial responsibility for or control over the conduct of governmental affairs," Scelfo v. Rutgers University, 116 N.Y. Super.403, 282 A.2d 445 at 449 (1971), and their position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." Gray v. Udevitz, 656 F.2d 588 (10th Cir. 1981).

"Although a comparably low-ranking government office, a patrolman's office, if abused, has great potential for social harm." Moriarty v. Lippe, 162 Conn. 371 294 A.2d 326 at 330 (1975). A police officer investigates crimes, makes arrests, and is "vested with substantial responsibility for the safety and

welfare of the citizenry in areas impinging most directly and intimately on daily living: the home, the place of work and of recreation, the sidewalks and streets." Roche v. Egan, supra at 762. The nature and extent of the responsibility of a police officer "is punctuated by the fact that a firearm, no less than a badge, comes with his office." Id. As a Missouri court correctly pointed out for the 250 families residing in the village of Lake Tapawingo the actions and activities of their local police "were probably of more direct concern....that were the doings of the Director of the F.B.I." Rowden v. Amick, supra at 8857.

In Coursey v. Greater Niles Township Publishing Corp., supra, a patrolman on a municipal police force brought suit against a local newspaper alleging he had been defamed. In concluding that a patrolman is a public offical under federal constitutional law the Illinois

Supreme Court held that:

"Although as a patrolman he is 'the lowest in rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly 'governmental' in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level than in the qualifications and conduct of other comparable low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws."

239 N.E.2d at 841.

Similarly, the Tenth Circuit Court of Appeal explained why a patrolman in Rock Springs, Wyoming must be regarded as a public official:

> The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily

> injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and performance warrant the conclusion that he is a public official.

Gray v. Udevitz, 656F.2d 588, 591 (10th Cir. 1981).

Seldom is precedent on a single issue so extensive and uniform. Since the case sub judice offers no real or important issues different from the cases discussed above, it does not merit the ear of this Court.

2. It would be unduly cumbersome for this Court to entertain the question found in the Petitioner's Argument.

Petitioner's Argument centers upon the following proposal:

> The court should grant this writ of certiorari to determine how far down among the ranks of government employees the public official designation extends for the purposes of the New York Times Co. v. Sullivan rule and to otherwise specify the categories of persons who would or would not be included. (Petitioner's brief pp. iii, and 14).

In order for this court to meet the objective of this proposal, it would have to examine a myriad of government jobs. In its analysis, the court would have to evaluate thousands of jobs from the most sophisticated to the most ministerial. Such an endeavor would include employees such as F.B.I. Agents, C.I.A., janitors, nuclear power plant administrators and judicial publishers. Such a task is, not only, burdensome for this court, but also, unnecessary at this time. The decision below turns on its own facts and affects few if any other litigants.

3. The decision below does not meet the requirements nor the except to finality. Therefore, this Court does not have jurisdiction to grant a writ of certiorari.

Upon examining federal statutes regarding the jurisdiction of the Supreme Court, it is evident that the case sub judice does not

meet the statutory requirements of 28 U.S.C. Section 1257, i.e. finality. Strict construction of this statute along with cases that interpret it dictate that "[r]eview can only be had of "final judgments or decrees."[15]

However, in recent years the Court has departed[16] from its strict interpretation of the jurisdictional statute, 28 U.S.C. 1257(3), in Cox Broadcasting Corp. v. Cohn,[17] the court explained the limited exceptions for which it would hear cases when finality was questionable, by saying:

15. C.A. Wright, Law of the Federal Courts (3d ed. 1976), p. 537, and R.L. Stern & E. Gressman, Supreme Court Practices (5th ed. 1976) pp. 177-183. See also the following line of cases which held that a judgment or decree of the highest court of state reversing an inferior court and specifically remanding the case to the lower court for a new trial is not a final judgment, and hence is not reviewable by the United States Supreme Court. Houston v. Moore, 16 U.S. 433 (1815); Urie v. Thompson, 337 U.S. 163 (1949).

16. Law of Federal Courts, supra pp.539-540.

17. 420 U.S. 469.

> "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." (emphasis added).

420 U.S. 46 at 482-483.

Although this case may fall into the same category as Cox, supra, it does not merit this Court's audience since it does not "seriously erode federal policy."

18. Law of Federal Courts, supra pp.539-540.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of February, 1985, three copies of the Respondent's Brief In Opposition of the Petition for Writ of Certiorari were mailed, postage prepaid, to Joseph M. Ciarciaglino, Jr., Esquire; of Osborne & Ciarciaglino, 433 Fourth Street North, St. Petersburg, Florida 33701, counsel for the Petitioner. Further, I certify that all parties required to be serviced have been served.

/s/

ELIHU H. BERMAN

Council for the Respondent